CRITICAL ESSAY ON JURISDICTION: AN ISSUE ON INTERNET

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ABSTRACT:
Every nation has the right to exercise jurisdiction over its citizens, territory, and subject matter. However, the relationship between Jurisdiction and the Internet has been ambiguous and the reason behind this is because Internet is global. Internet & Jurisdiction is the global multistakeholder policy wherein jurisdiction depends predominantly on the geographical division of the world into national territories, while the Internet facilities considerable cross-border exchange, which is difficult, although not impossible to monitor via traditional government mechanisms. The question of jurisdiction of the Internet governance: How is it possible to ‘anchor’ the Internet within existing legal and political geographies? This paper proposes the creation of issue-based multistakeholder policy networks to create flexible solutions to jurisdictional tensions such as cross-border access to user data, content takedowns, and domain seizures.

Keywords: Internet, Jurisdiction, Governance, Information, Technology.

LITERATURE REVIEW
The source of data is secondary and mostly taken help from library, statutes, journals and internet.

RESEARCH OBJECTIVE/ RESEARCH METHODOLOGY
The way of research is secondary research and the type of research is qualitative research. This paper is based on doctrinal research i.e., secondary research and non-doctrinal or empirical legal research. As doctrinal research is conducted on the basis of data collected by source, i.e., collected by books, web and other indirect resources and non-doctrinal research involves the use of research perspective, research design etc. This project adopts the concept of both research methodology. The doctrinal and non-doctrinal research methodology would be used in analysing the Critical Essay on Jurisdiction: an issue on Internet.
The method of research shall be analytical which is based on relevant fact, information, statutes which shall be thoroughly scrutinized by the author to enable the person form opinions and make a critical evaluation of the subject matter.

STATEMENT OF PROBLEM
The internet jurisdictional issues take place and arises time to time because the Internet is a cross-border communications medium with no single authority governing it and disputes between countries with different laws often arise. The question of jurisdiction of the Internet governance: How is it possible to ‘anchor’ the Internet within existing legal and political geographies? In this paper, the author proposes the creation of issue-based multistakeholder policy networks to create flexible solutions to jurisdictional tensions such as cross-border access to user data, content takedowns, and domain seizures.

RESEARCH QUESTIONS
i. What is Internet and jurisdiction on internet?
ii. How internet jurisdiction is an important issue in current scenario?
iii. What are the possible solutions in light of the need of the governance of the jurisdiction of the Internet?

INTRODUCTION
The Internet is a “giant network that interconnects innumerable smaller groups of linked computer networks”.¹ In managing, promoting, and protecting [the Internet’s] presence in our lives, we need to be no less creative than those who invented it. Clearly, there is a need for governance, but that does not necessarily mean that it has to be done in the traditional way for something that is so very different.

- KOFI ANNAN, THEN US SECRETARY-GENERAL²

Internet jurisdiction has become major concern at the intersection of human rights, the international digital economy and security. In recent years, discussions and reform efforts addressing this topic have sprung up all over the world, involving a wide range of policy silos and multiplicity of actors.³ The cross-border Internet and its online spaces cut through a patchwork of national jurisdictions. Conflicts between jurisdictions are becoming more common as accessibility and Internet penetration grow. Traditional forms of legal cooperation fail to overcome these jurisdictional disputes, posing a challenge to the Westphalian international structure. If applied on a global scale, the concept of territoriality and the assertion of digital sovereignty set the global economy on a dangerous course. This legal arms race could have serious unforeseen

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³ The Global Internet and Jurisdiction Conference gathered key representatives from states, Internet platforms, technical operators, civil society, academia and international organizations on an equal footing to address the issue of jurisdiction online. The goal of the Global Internet and Jurisdiction Conference was to enable transnational cooperation and catalyse operational solutions. <Internet & Jurisdiction…> Internet & Jurisdiction Policy Network > accessed 27 December 2021
implications for the future of the global digital economy, human rights, cybersecurity, and technological Internet infrastructure if nothing is done.\(^4\)

Traditional forms of international legal cooperation are being challenged by digital realities in the twenty-first century, exposing an institutional void in Internet governance that can be filled by learning from the technological governance of the Internet. Maintaining the Internet's global character, combating illegal online behaviour, and establishing procedural interoperability and due process across borders necessitates innovative cooperation mechanisms that are as transnational as the Internet itself.

BACKGROUND ON HOW JURISDICTION IS A PROBLEM ON INTERNET

I am writing this paper on jurisdictional issues that arise on the Internet because the Internet is a cross-border communications medium with no single authority governing it and disputes between countries with different laws often arise. For example, in 2013, citizens in France sue Twitter, demanded to know the identities of anonymous Twitter users who had posted anti-Semitic tweets on the social media website.\(^5\) Twitter balked at handing over the identifying information. After all hate speech as offensive as it is, is still protected by the First Amendment in the United States and twitter servers along with the offensive Twitter users were both located in the United States but in France, hate speech is illegal and a French Court ruled in favour of the French citizens.\(^6\) Eventually, twitter reluctantly handed over the information.\(^7\)

Consider the far-reaching impacts of this attempt to regulate Internet and social media speech. Do laws of one country apply to a company based in another country whose laws differ? Can a nation ever have global jurisdiction over speech on the Internet?\(^8\) Such disputes are becoming more common for few reasons.

1) Different countries have differing ideas on internet regulation
2) Our existing remedies for resolving international conflicts of law are inadequate for the Internet
3) With nearly 200 countries, there is no one-size fits all solution

Courts and commentators have long recognized these issues, yet there has been little progress made towards finding a solution to the Internet jurisdiction dilemma. Given a situation, it is imperative to establish a workable framework for resolving such


\(^6\) BBC News, < French court orders Twitter to reveal racists’ details - BBC News > accessed 27 December 2021

\(^7\) Hindustan Times, < Twitter hands over data in French anti-Semitism case | Hindustan Times > accessed 27 December 2021

\(^8\) Allan R Stein, ‘The Unexceptional Problem of Jurisdiction in Cyberspace’ (1998), 32 INT'L LAW 1167. See Henry H. Perritt, Jr., ‘Will the Judgment-Proof Own Cyberspace’ (1998) 32 INT'L LAW 1121. See also Henry H. Perritt, Jr., ‘Jurisdiction in Cyberspace’ (1996), 41 VILL. L. REV. 1, 9-13, for a thoughtful parsing of the difference between these discrete questions in the context of claims arising out of Internet activity
conflicts among government with differing values and goals.

This limbo over jurisdiction has severe consequences, for example, the economy suffers as businesses are less likely to invest and innovate due to legal uncertainties. Dot coms also wastes valuable resources handling international legal disputes. And some users may find themselves facing legal claims for activities that are legal in the user’s country. While others must surf the web without any certainty that redress is available for harms they might suffer online.

Evidences / cases where jurisdiction was considered as issue

This paper will provide examples of recent and ongoing conflicts between countries involving the internet. It will discuss the differing views of internet regulation and talk about the inadequacy of existing remedies. It will also discuss some possible solutions for working that out. There are various instances of international conflicts involving the internet amongst which one of the conflicts was seizing of Julian Assange, who is the founder of WikiLeaks in which both Britain and the United States were trying to prosecute him but it was unclear whether he had broken any law and whether either of these countries have jurisdiction in this matter. In another case, USA often presents itself as the bastion of Internet free speech, but it arguably overstepped its bounds sometimes. Consider the 2008 case of a British citizen who was living in Spain and operating a website the Internet servers in the Bahamas which sold holidays to Cuba to European citizens but he has his domain name impounded by the United States Government because the domain name was registered in the United States and it appeared to break the United States embargo against Cuba.

For example, two California judges in the same district court disagreed about their jurisdictional competence to hear cases between a Korean plaintiff and an Australian defendant, who used United States social media platforms. One judge initially ruled that the court did have jurisdiction to hear the case but that was later overturned by another judge who decided that the court did not have jurisdiction. A big part of the reason that these disputes occur in the first place is because different countries have differing models for internet regulation. Even within the United States for example, there is a huge debate over the issue of network neutrality. Take a look at some of the different models for internet regulation that different countries use -

1) Self-Governance

This model insists that the Internet community is capable of regulating itself and promulgation of domestic and international laws is both unnecessary and undesirable but that ship has sailed. However, self-regulation model is not accepted globally resulting which most countries have already regulated the Internet within the framework of their political, legal, moral and cultural values.

2) Neo-Mercantilism

It is the second theoretical model of Internet regulation which is based on the premise that the Internet is essentially a vehicle of

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commerce. Therefore, the role of government is to ensure the free flow of commerce along the information superhighway and to remove any impediments. This model is considered to be the American approach to Internet regulation.11

3) Culturalism

This model views cultural protection as the primary objective of Internet regulation. Internet laws and policies are enacted to reflect and protect a nation’s intellectual, aesthetic and moral values, with little consideration of their global impact. French ruling Twitter illustrates the culturalist perspective.

4) Globalism

This model requires multinational political, economic, technological, and cultural cooperation in regulating the Internet. This model relies on treaties and international conventions to achieve that goal. Although international regulation of intellectual property and child pornography on the internet has made some progress.

There are no international agreements resolving international jurisdiction.12 This is not an exhaustive list of the different approaches to internet regulation but these are some of the widely recognised ones.

There are different types of tests to determine the jurisdiction of the Internet. In classic Internet case of Zippo Manufacturing Company v. Zippo Dot Com, Incorporated,13 famously known as Sliding Scale Test, classify three kinds of website-

1. Passive Website
   • It only provides information
   • Cannot make any changes
   • It does not come under jurisdiction forum

2. Interactive Website
   • Can make changes
   • Request some information
   • Interact with you for your welfare
   • It does come under the Jurisdiction

3. Integral Website
   • It has some property of passive and interactive website

In this case, it was held that place of jurisdiction will be the case with interactive website. The “Sliding Scale” or “Zippo” Test has been accepted as the standard in Federal Courts of the USA in deciding personal jurisdiction in Internet cases. Such cases are now primarily decided based on a determination of the website’s "interactivity". Courts have held that the greater the commercial nature and level of interactivity associated with the website, the more likely it is that the website operator has “purposefully availed itself” of the forum state’s jurisdiction.

In another case of Internet, namely Calder v. Jones,14 which is famously known as Effects Test. It was a case in which the United States’ Supreme Court held that a court within a state could assert personal jurisdiction over the author and editor of a national magazine which published an allegedly libellous article.

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11 See id. at 464
12 Tim Gerlach, Note, ‘Using Internet Content Filters to Create E-Borders to Aid International Choice of Law and Jurisdiction’ (2005) 26 Whittier L. Rev. 901-902
about a resident of that state, and where the magazine had wide circulation in that state. It was held that a state’s courts assert personal jurisdiction over the author or editor knowing that the article would be widely circulated in the state where the subject of the article would be injured by the libellous assertion and also held that California courts had jurisdiction over the defendant.

Section 75 of the Information Technology Act, 2000\(^{15}\) has jurisdiction in India. In addition to this, Section 3\(^{16}\) and 4\(^{17}\) of Indian Penal Code, 1860 has the jurisdiction in which punishments are provided of offences related to Information Technology Act, including Section 20 of Civil Procedure Code, 1908\(^{18}\). All these three acts work along with each and read with all these sections under the jurisdiction on the Internet and offences related to it.

In Banyana Tree Holding (P) Limited v. A. Murali Krishna Reddy and Anr.,\(^{19}\) and famously know as Banyan Tree case, personal jurisdiction application of test was applied by Indian courts. This case deals with two issues and is the classic example of both the tests.

The following questions needs to be addressed:

**Sliding scale test:**

What was the degree of interactive of the website?

**Effect Test:**

Did the specific targeting of the forum state result in injury or harm to the plaintiff?

In this, the issue was whether accessibility of a website in a particular place may itself be sufficient for the courts of that place to exercise personal jurisdiction over the owners of the website? The court held that merely accessing a website in Delhi would not satisfy the exercise of jurisdiction by the Delhi court.

**ANALYSIS**

International disputes between countries are nothing new but why are they particularly challenging to resolve when it comes to the Internet? There is no dispute that a sovereign state may create and enforce laws concerning activities within borders but the Internet is a cross-border space.\(^{20}\) In the traditional analogue world, it was relatively easy for courts to determine the geographical locations of the person’s objects and activities relevant to a particular case. Even International Sea Law such as the United Nations Convention on the law of the sea is based on territory. However, an online activity often involves actors and intermediaries in multiple physical locations.

Diverse sets of potentially incompatible laws & rules overlap and frequently are in conflict. Virtual frontiers do not map out neatly into boundaries of national territories. Content providers may physically reside in one place, conduct their business in another place and locate their servers in a third

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\(^{15}\) Information Technology Act, 2000, s 75

\(^{16}\) Indian Penal Code, 1860, s 3

\(^{17}\) Indian Penal Code, 1860, s 4

\(^{18}\) Civil Procedure Code, 1908, s 20


\(^{20}\) Bertrand De La Chapella, Paul Fehlinger, Jurisdiction on the Internet: How to move beyond the legal arms race, <Jurisdiction on the internet: How to move beyond the legal arms race | ORF (orfonline.org) > accessed 27 December 2021
location and their content is readily accessible from anywhere in the world. As the French-Twitter case and the Cuba travel case illustrate, cross-border platforms can host user-generated content that might be deemed illegal in certain jurisdictions but not in others. Furthermore, attempts to identify the location of a particular user over the Internet have proven extremely difficult and many Internet users compound this problem by intentionally hiding their location.

If a crime is committed upon the high seas far from any sovereign land, who is this reported to? Can the offender be prosecuted, if so by what laws? Internet perhaps is one of the most visible aspects of globalization and in many ways is driving force. Globalization tends to be the most perceptible and observable in mostly every facet of life, mainly due to the emergence of internet technology. For much of the world, spatial distance and national borders become irrelevant due to one’s access to internet. This, therefore presents a problem, as without geographical location for a matter to attach to, the question arises who is responsible for adjudicating the matters of the internet.

So, what does this mean for contemporary global lawyers in practice? Due to the absence of rules, regulations and policy standards for the global jurisdiction of the internet, the global lawyer has to attempt to navigate their way through the complicated system. A system that lacks the traditional guidelines of jurisdictional boundaries such as nations, sovereignty, territory norms. Consequently, globalization coupled with digital technologies have effectively removed lawyers from the constraints of any one jurisdiction. Therefore, requiring modifications to lay lawyers are educated, trained and regulated.

This jurisdictional challenge is present in the prosecution of Julian Assange, the founder of Wikileaks, with both Britain and the US trying to attempt to prosecute him for over 10 years. In Australia, the case of Dow Jones & Gutnick, a unanimous decision held that Gutnick had the right to sue for defamation in Australia, even though the article in question was uploaded in New Jersey. This case demonstrates the Australian approach this jurisdictional challenge, specifically by the judgment of Justice Kalanin outlining that if people wish to reap the benefits of different countries, they can hardly expect to be absolve the laws of those countries. Handling the coexistence of heterogeneous laws on the cross-border internet is deemed as one the greatest policy challenges of the 21st century.

As stated by Uta Kohl in 2007, this challenge arises as a jurisdictional boundary imposed by state sovereignty does not apply to the transnational internet and no internationally recognized laws, regulations or rules surrounding this field. So where exactly does this leave us? It is understood that global companies have attempted to implement terms of service agreements which aim to dedicate the jurisdiction in which legal conflicts will be resolved. For example, Facebook, their terms of service state that any claim or dispute must be resolved by any competent court in the country of the claim. This opens Facebook up to claims in all countries, requiring

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22 Dow Jones & Gutnick, [2002] 210 CLR 575
knowledge and understanding of various laws, cultures and norms. Further, these terms of service are not always accepted by domestic courts. This is not sustainable and adaptable enough, especially with an increasing reliance on technology. This presents unprecedented challenges requiring a great understanding of international laws, global governance, globalization, cultural competency and digital capability.

Upon confrontation of this challenge, the legal practice needs to the emic perspective and adapt to become a more cosmopolitan lawyer. The academics and scholars have attempted to utilize this theory of cosmopolitanism to propose solutions for the internet presents. Dennis T. Rice\textsuperscript{24} proposes a specialized internet jurisdiction, where cyber space has its own legal order. However, does not adequately take into consideration for our state sovereign Westphalian world\textsuperscript{25}. Although this would be an ideal solution, the current dynamics of states would not accept external jurisdiction over their power. Jeremy Malcolm\textsuperscript{26} proposed a multi-stakeholder unifying policy standard based upon an international agreement or treaty. No treaty is not compulsory to all states and not binding on domestic laws and require ratification to take effect. This proposal presents evident hurdles to overcome, however, the TRIPS agreement\textsuperscript{27} has proven a precedent for how these hurdles can be overcome by presenting the solutions as more of a guideline for states instead of an international treaty.

**SUGGESTIONS**

The development of this multi-stakeholder standard will provide an international guideline how to approach the jurisdiction of the internet and assist global lawyers present a more unified and strategic approach. This approach would allow for global participation and decentralized processes allowing a diverse range of stakeholders. Accompanied by these guidelines a global lawyer would need to be greatly trained, educated and regulated in this process to promote uniformity. This is the most realistic and adaptable solution for the newly globalised world and the evident challenges the jurisdiction of the internet present.

Traditional principles of international jurisdiction, particularly territorially are poorly suited for this sort of environment of geographic anonymity. As a result, courts have long struggled to come up with a satisfactory solution to these sorts of problems yet no progress has been made toward a uniform global standard for Internet jurisdiction. There are some of the common proposals for resolving these conflicts of laws-

\begin{itemize}
\item[25] Westphalian system is a global system based on the principle of international law that each state has sovereignty over its territory and domestic affairs, to the exclusion of all external powers, on the principle of non-interference in another country’s domestic affairs, and that each state (no matter how large or small) is equal in international law. The doctrine is named after the Peace of Westphalia, signed in 1648, which ended the Thirty Years’ War. < Nation-States and Sovereignty | Boundless World History (lumenlearning.com) > accessed 27 December 2021
\item[27] World Trade Organization, < WTO | intellectual property - overview of TRIPS Agreement > accessed 27 December 2021
\end{itemize}
1) A universal regulatory scheme

An international convention would lead to treaty establishing substantive “universal standards” for what’s legal and illegal. The treaty would also create an international body that would promulgate civil and criminal Internet regulations and jurisdictional rules. However, getting approximately 200 nations to agree on standards and then adopt them into their domestic legal codes seems daunting, if not possible. Attempts to do this with outer space and the moon haven’t worked well. Either few countries adopt the law or it is so vague as to be toothless. Adoption of a universal internet law could also create conflicts between the universal internet regulations and the domestic laws regulating the same activities.

2) A global standard for determining jurisdiction

In order for this proposal to work, a treaty would be signed by all nations that creates a single test for determining Internet jurisdiction. It could, for example, be an effects test. Under this principle, a country may assert jurisdiction over conduct that has an effect, but does not actually occur, within its border. As with the universal standard though reaching a consensus would be daunting.

3) Filtering

Under this model, governments would regain control of their borders by placing blocking and tracking technologies at international access points or at the Internet Service Provider’s (ISP) servers to act as Centurions. For example, if France does not want its citizens to see antisemitic tweets, they could simply block those sorts of tweets or block Twitter altogether. In fact, many governments have already implemented such technologies to monitor and regulate Internet activities of these citizens. However, such filters can easily be circumvented and won’t solve issues such as defamation and copyright infringement. In addition, this could undermine the Internet’s infrastructure and it is antithetical to its founding purpose of being a tool to share information.


The fourth proposal for resolving conflicts of laws is a choice of law’s provisions. Under this proposal, content providers and users could agree to resolve disputes in a particular forum via choice of law provisions in terms of service contracts. But there would need to be an international consensus regarding the validity of such agreements. This seems unlikely given that it would limit government’s power and European Union has been reluctant to allow forum selection clauses.

5) Do nothing

Not all of the issues of Internet regulation require solutions. But, of course, conflict will persist if we do nothing.

CONCLUSION

So, what is the solution then? Because after mentioning about hearing all these proposals it kind of sounds like there is no sort of silver bullet that they all have drawbacks. The best model for internet governance is probably a hybrid that incorporates some elements from all five models. Internet governance is a complex task requiring a complex set of regulatory mechanism. As a result, the optimal system of governance is a combination of regulation. Various stakeholders including government officials, tech companies and medicines, all need to be involved in that process. Organizations like
the Internet Governance Forum\textsuperscript{28} and Internet and Jurisdiction Policy Network\textsuperscript{29} have propped up to tackle these issues. Progress may also be achieved by using existing channels and devices such as the United Nations\textsuperscript{30}, Global Commission on Internet Governance (GCIG)\textsuperscript{31}, Global Investigation Journalism Conference (GIJC)\textsuperscript{32}, ICANN\textsuperscript{33}, Observer Research Foundation (ORF)\textsuperscript{34}. Admittedly, the solution may seem like a bit of a cop-out but keep in mind the reason for the deadlock concerning internet jurisdiction is because each of the most common solutions have significant drawbacks. There is no silver bullet making internet jurisdiction, like so many issues involving internet law, something that will continue to plague and perplex us indefinitely.

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